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No. 84-5872

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

ROY E. DANIELS,

*Petitioner,*

v.

ANDREW WILLIAMS,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court of Appeals**
**For The Fourth Circuit**

## REPLY BRIEF FOR PETITIONER

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## SUMMARY OF REPLY

Petitioner brought this case to recover damages which he alleged resulted from Respondent's negligence. Respondent and other officers of the jail in which Petitioner was housed exercised virtually total control over Petitioner as they did over other inmates. But, Respondent maintained below and he continues to maintain before this Court that even if he was negligent, his negligence caused Petitioner severe injuries, and Petitioner could not avoid the injuries because as a prisoner he was subject to Respondent's control, Petitioner has no right to recover damages for his injuries—not in federal court and not in state court.

Respondent cannot, and therefore does not try to, distinguish among situations in which a prisoner is killed, maimed, crippled or injured to a lesser extent. Rather, Respondent claims that the Commonwealth of Virginia has the authority to immunize him from liability for damages in any action in any Virginia state court and that no federal court may hear Petitioner's claim pursuant to 42 U.S.C. § 1983.

The sum and substance of Respondent's argument is that a state may consciously choose to permit its prison and jail officers to act unreasonably and without due care. Respondent asserts that the Due Process Clause of the Fourteenth Amendment does not protect the property of the only citizens who may be kept in involuntary servitude under the Thirteenth Amendment—i.e., prisoners. According to Respondent, states are not obliged by any law to exercise reasonable care to protect the lives and safety of those who are imprisoned and denied freedom to protect themselves.

If Respondent is correct, then the following statement must be true: When the Civil Rights Act was adopted, the

Congress that passed it intended to permit sheriffs, deputy sheriffs and others acting under color of state law to disregard the well established common law rule requiring those persons who had official custody of prisoners to protect those prisoners; the Congress was indifferent to the possibility that the officers who had disregarded the civil rights of Negroes prior to the Civil War would fail to protect persons entrusted to their custody after the War; the Congress intended to provide no federal protection for prisoners against injury or death resulting from the failure of state officers to protect them; and that an officer who acted under color of state law in an unreasonable fashion—e.g., by failing to protect a prisoner from a lynch mob—could not be held responsible in a federal court, even though no state court afforded a remedy for the officer's disregard of duty.

Certainly, this cannot have been the intent of the Congress in 1871. Petitioner argues that Congress intended to assure that state officials would exercise reasonable care in dealing with persons who were deprived of their freedom pursuant to the enforcement of state criminal law. He asks this Court to reaffirm its holdings in *Parratt* v. *Taylor*, 451 U.S. 496 (1981), and in *Hudson* v. *Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984), and to indicate that a prisoner who is injured as a result of the negligence of state officers has a right to sue under § 1983 unless the state affords the prisoner a meaningful state court remedy.

Petitioner's argument is consistent with the common law duty owed by officers to prisoners and the background of the 1871 Civil Rights Act, and it recognizes the proper respect federal courts should pay to state law. If Petitioner's argument is accepted, no state need fear untoward federal intrusion into state prisons or a radical

increase in federal lawsuits. The truth, which Respondent never recognizes in its Brief, is as follows: *If Petitioner's argument is accepted, no prisoner will be able to sue state officers in federal court under § 1983 for ordinary torts of any kind—not for negligence, not for recklessness, not even for intentional torts generally—as long as state courts provide meaningful remedies for injuries resulting from official breaches of the duty to protect the lives and safety of prisoners.* Another way of putting the same point is to state that "*if Petitioner's argument prevails, a state and its officers can assure that they need not face § 1983 suits in federal court by policing in their own state courts the breaches of official duty that injure or kill prisoners who are denied the freedom to protect themselves.*

## ARGUMENT

### I. RESPONDENT HAS PRESENTED NO ARGUMENT FOR TREATING LIBERTY INTERESTS DIFFERENTLY FROM PROPERTY INTERESTS UNDER *PARRATT* V. *TAYLOR*, 451 U.S. 527 (1981), AND *HUDSON* v. *PALMER*, ___ U.S. ___, 105 S.CT. 3194 (1984).

Petitioner argued in his opening brief that there is no basis in the language of § 1983, in its legislative history, in common sense or in reason to treat liberty interests less favorably than property interests in litigation brought under the Civil Rights Act. The decisions of this Court have never indicated that liberty interests and a person's interest in life and safety warrant less protection than does a $23.50 hobby kit. Quite to the contrary, the decisions of this Court have shown a special respect for the person and the integrity of the person. *See, e.g., Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949), speaking of the right of personal security; *Mathews* v. *Eldridge*, 424 U.S. 319,

340 (1976), distinguishing *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), on the ground that *Goldberg* involved a denial of the means to live; *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), finding that there is a right to be free from "unjustified intrusions on personal security."

Respondent does not address these cases nor the background of § 1983. Nor does Respondent point to any decision other than the 5-4 decision by the court of appeals below supporting his argument. Were this Court to accept Respondent's argument, it would be saying that the title of § 1983, "the Civil Rights Act," was wrongly chosen. Respondent would have this Court believe that the Congress that passed § 1983 was concerned not with the freedom, safety and security of newly enfranchised citizens, but with property. Respondent's argument ignores the reading this Court has given to the Civil Rights Act in past cases. It also ignores the language of the Act which fails even to mention property.

The fact is that Respondent cites the Court no authority in support of the decision below other than *Parratt* and *Hudson*, which had no occasion to discuss liberty interests. (Brief for Respondent, at 7-8.) The decisions of this Court, the title and text of § 1983, the legislative history of the statute, the decisions of the other courts of appeals and a decent respect for humanity all say that the court of appeals was wrong. Thus, liberty interests must receive at least the same protections afforded property interests under the Due Process Clause.

For some unexplained reason, Respondent fails to mention this Court's decision in *Wilson* v. *Garcia*, ___ U.S. ___, 105 S.Ct. 1938 (1985).[1] *Wilson* holds that federal

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[1] *Wilson* was decided on April 17, 1985. This was after Petitioner's Brief was filed but well before Respondent's brief was filed.

rather than state law governs the characterization of § 1983 actions for statutes of limitations purposes, and that a § 1983 claim is most appropriately characterized as a personal injury claim. In light of this decision, it is difficult to see how Respondent can argue that liberty interests receive less protection than property interests.

## II. NO DISTINCTION SHOULD BE DRAWN BETWEEN INTENTIONAL AND NEGLIGENT ACTS FOR PURPOSES OF SECTION 1983.

Petitioner offered four reasons in his opening brief why the Court should reaffirm its *Parratt* decision that negligent deprivations of a prisoner's protected interests require a remedy. Respondent declines to address any of these reasons except in a perfunctory way. Instead, Respondent cites cases for propositions that they do not support and ignores cases that are more directly in point.

First, Petitioner noted (Brief for Petitioner, at 17) that the Court in *Parratt* had examined the language and the history of § 1983 and had determined that nothing in either suggested that the statute was intended to apply solely to intentional deprivations. *Parratt*, 451 U.S. at 534. Respondent ignores the fact that the Court reached this judgment in a decision that is only four years old and simply asks, without reference to the language or the history of the statute, that the Court ignore the law—i.e., the legislative history, the words in the statute and the language of *Parratt*—in order to declare that something more than negligence is required for a plaintiff to proceed under § 1983. (Brief for Respondent, at 12-15.) This is an invitation to decision by fiat rather than to decision by rule of law.

Second, Petitioner observed (Brief for Petitioner, at 17-18) that any distinction that is drawn between negli-

gence and intentional acts will simply cause plaintiffs to amend pleadings in order to bring a federal suit. For instance, a plaintiff might allege that the defendant's acts were more than simple negligence. If this is sufficient to create a cause of action, the pleading requirement is largely useless.

Respondent asks the Court to hold that mere negligence is not enough. But Respondent does not indicate how much more should be required. What Respondent ignores is thats even in the simplest case, the line between negligence and intentional actions is not easily drawn. The instant case proves this point.

In his affidavit in the district court, (J.A., at 17), Petitioner, a lay person unrepresented by counsel, alleged that he had fallen on a pillow while going down stairs while the pillow was on some newspapers. He alleged that he was told that Respondent had left the pillow on the stairs and that Respondent admitted he had done so but offered no explanation. In the court of appeals, Respondent argued that this allegation "[a]rguably . . . states a cause of action based on something more than mere negligence." (Brief of Andrew Williams in Court of Appeals, at 10.)

The plain truth is that almost all negligence cases involve intentional acts. In this case, for example, the complaint may be read as charging that Respondent intended to leave the pillow on the stairs where Petitioner fell on it. In *Parratt*, prison officials intended to keep the hobby kit from the prisoner. In *Davidson* v. *Cannon*, No. 84-6470, the case scheduled for argument along with the instant case, the prison officials intended to offer no additional protection to Davidson despite their knowledge of a threat made to Davidson. In these and in many cases, the plaintiffs allege that the defendants intended to take cer-

tain actions or to refrain from taking actions. Typically, the plaintiff alleges that the decision to act or not to act was negligent or was a breach of a duty established by law which is the equivalent of negligence.

A holding that would restrict § 1983 to complaints alleging something more than mere negligence would require this Court to address even more complicated issues than it has yet had to face under the statute. Is an intentional act plus negligence sufficient to create a cause of action? Is clear negligence sufficient? Would recklessness be sufficient? What about gross negligence?

Deans Prosser and Keeton have observed that "intent" is one of the most often misunderstood legal concepts.[2] They note that the intent which governs most tort law "is not necessarily a hostile intent, or a desire to do any harm."[3] In fact a defendant may be liable for actions taken while "honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good."[4] After two hundred years of tort litigation and the development of a myriad of subtle differences between intent and malice, knowledge and intent, and intent and motive, this Court would undertake to write a new code of tort principles for federal courts were it to accept Respondent's argument and hold that allegations of negligence are insufficient to state a claim under § 1983.

Even worse, the Court would have to compare its definition of these concepts with those used by various states. It is possible, for example, that the Court could rule that

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[2] W. Prosser & W. Keeton, Prosser and Keeton On The Law Of Torts § 8, at 33 (5th ed. 1984).

[3] *Id.* at 36.

[4] *Id.* at 36-37 (footnotes omitted).

recklessness or intentional injury is sufficient to support a claim under § 1983, while a state like Virginia might require a greater showing of fault to deprive an officer of sovereign immunity.[5] Or, a state might use language similar to that chosen by the Court but give it different meaning. To decide whether a prisoner has a meaningful remedy in state court, a federal court would have to parse the intricacies of state tort law.

The fact is that Respondent cannot even suggest to the Court exactly how much more than negligence must be shown by a prisoner who sues under § 1983. (Brief for Respondent, at 14.) At one point, Respondent speaks in terms of intentional conduct, gross negligence, or reckless indifference." *Id.* But, later he implicitly asks the Court to overrule *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), and to hold that a plaintiff must prove willful or recklessly indifferent behavior. (Brief for Respondent, at 18).[6] It is apparent that Respondent has no idea whether willfulness is the same as gross negligence or is different.

Deans Prosser and Keeton observe that the concept of degrees of negligence "has been condemned by most writers, and, except in bailment cases, rejected at common law by most courts, as a distinction 'vague and impractica-

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[5] This is not an unlikely scenario. The Virginia Supreme Court has stated in dictum that a defendant who acts "wantonly, or in a culpable or grossly negligent manner" is not protected by sovereign immunity. *James* v. *Jane*, 221 Va. 43, 53, 267 S.E.2d 108 (1980). Whether a Virginia court would equate recklessness and gross negligence is uncertain. Whether any state court would attribute the same meaning to various terms that this Court would is also unclear.

[6] Respondent does not indicate to the Court that it would have to overrule a part of this case, but it is clear that the Court would have to do so, because *Monroe* v. *Pape*, 365 U.S. 180, 187 (1961), rejects a willfulness requirement.

ble in [its] nature, so unfounded in principle,' that it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury."[7] They go on to demonstrate that it is hardly clear even now what terms like willful, wanton, reckless or gross negligence mean. For this Court to accept Respondent's argument, it must be prepared to devote substantial time and energy to monitor the subtleties of tort principles that have left the finest scholars puzzled.[8]

The effort to draw a line separating negligence from intentional torts is not worth the candle. More importantly, it is inconsistent with the purpose of § 1983.

Section 1983 was enacted, along with the Fourteenth Amendment and other civil rights provisions, to assure that the basic liberties of all citizens would be protected.

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[7] Prosser & Keeton, *supra* note 2, § 34, at 210, quoting Heuston, Salmond on Torts, 16th ed. 1973, § 80, at 224 n.69 (footnotes omitted). This Court has first-hand experience with the slippery concepts of malice, gross negligence and recklessness. *See Smith* v. *Wade*, 461 U.S. 30 (1983).

[8] The Court would also be faced with enormous problems of determining when a litigant should be collaterally estopped from pursuing a § 1983 claim. Suppose, for example, that a state provided sovereign immunity for all torts except intentional and willful ones, and that aggravated negligence or a high degree of negligence was insufficient to deprive an officer of immunity; and that this Court held that gross negligence or recklessness was sufficient to warrant a § 1983 action. If a prisoner first sued in state court and lost, a federal court hearing his next suit, brought in federal court under § 1983, would have to decide whether the prisoner lost because the jury believed there was no fault or because the jury believed there was no willfulness. If the jury believed the latter, the prisoner would have a valid § 1983 suit. But, if the state court uses a general verdict, how could the federal court realistically know whether or not to hold that the prisoner is estopped?

Surely the Congress that enacted the statute to protect all people from wrongful deprivations of their liberty, which had been aided and abetted by sheriffs failing to offer protection, were not concerned with whether rights were denied intentionally or indifferently. The goal of the statute was to force officers acting under color of law to conform to the requirements of law.

The Court recognized this in *Monroe* v. *Pape*, 365 U.S. 167, 180 (1961), as it quoted Senator Thurman's speech concerning § 1983, wherein he observed that under the statute, "[t]he deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they might be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts . . . ."[9] The Court went on to reject any requirement that an act must be willful to fall within § 1983, as it stated that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequence of his actions." *Id.* at 187.

Third, Petitioner pointed out (Brief for Petitioner, at 18-19) that in some situations negligence claims plainly fall within § 1983, thus establishing beyond any reasonable doubt that the statute is not intended to distinguish between negligent and intentional torts. In *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978), for example, the Court held that defendants were entitled to judgment as a matter of law because they had not acted unreasonably.

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[9] The Senator proved to be quite prescient. *See, e.g., Carey* v. *Piphus*, 435 U.S. 247 (1978) (approving awards of nominal damages).

*Procunier* is simply one of many "qualified immunity" decisions rendered by this Court. *See also*, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). This Court made it clear in *Wood* v. *Strickland*, 420 U.S. at 322, that liability will be imposed under § 1983 when an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected." If the word "student" is changed to "person," the standard is the one applied in all qualified immunity cases. This standard holds an official liable for negligent acts as well as more deliberate ones. Respondent would have the Court for the first time create an immunity for all negligence—i.e., for every official who knew or reasonably should have known that he was breaching a duty. Such an immunity would remove much of the protection afforded by the statute. Yet, Respondent fails even to address these cases in arguing that negligence is insufficient to support a § 1983 action.

Finally, Petitioner argued (Brief for Petitioner, at 19) that as long as a state provides basic protections for prisoners and opens its courts to garden variety tort cases, federal suits will be unnecessary. Respondent ignores this argument and complains about the federal intrusion into state affairs (Brief for Respondent, at 18) without once recognizing that a meaningful state court remedy will move cases like the instant one into state courts where Petitioner indicated he would have sued but for the sovereign immunity doctrine.[10]

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[10] Judge Winter's concurring opinion in two companion cases that were argued together with Petitioner's in the court of appeals states

Rather than face any of the arguments made by Petitioner or to address the relevant decisions of this Court, Respondent cites *Paul* v. *Davis*, 424 U.S. 693 (1976); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Procunier* v. *Navarette*, 434 U.S. 555 (1978); and *Baker* v. *McCollan*, 443 U.S. 137 (1979), all of which are examined in Petitioner's brief and none of which is relevant to the arguments that Respondent makes to this Court.

In *Paul*, the Court found that a person had no protected interest in his reputation. It did not address the question whether, *if there had been a protected interest in reputation*, a negligent injury to that reputation might under some circumstances be actionable under § 1983. In *Estelle*, the Court held that under some circumstances a deliberate denial of medical treatment or reckless disregard of a prisoner's medical needs might be cruel and unusual punishment actionable under § 1983 *notwith-*

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that Petitioner had filed suit in state court before bringing this § 1983 action. (J.A. at 51 n.1.) Petitioner cited this statement in the Petition for Certiorari. Judge Phillips' opinion, dissenting and concurring in part, in the instant case (J.A., at 43 n.4.), makes a similar reference to a parallel state action. The statement is not quite accurate. The confusion among the judges is easily explained. During oral argument, Petitioner represented to the court of appeals that he would have sued and would still sue in state court but for the sovereign immunity doctrine. The en banc court of appeals specifically asked Respondent's counsel whether Respondent would waive the immunity defense *if Petitioner sued in state court*, and counsel stated categorically that the defense would not be waived. Thus, the judges were referring to a contemplated suit, not one actually brought. Petitioner requested that the court of appeals supply a copy of the en banc oral argument to this Court, but learned that the argument tapes had been erased. There is no doubt, however, that Respondent was invited by the en banc court to waive the defense and declined to do so.

*standing whether a state remedy existed.* The Court noted that state courts provided remedies for ordinary negligence in providing medical treatment.[11] As noted above, *Procunier* is a qualified immunity case. Contrary to the intimations by Respondent, the Court plainly indicated that there would be liability where defendants failed to conform their conduct to established legal standards. *Baker* did not involve a breach of duty at all. Police exercised reasonable care even though they arrested the wrong person. They held this person pursuant to a valid warrant. This Court did not say there would be no liability under § 1983 for a negligent arrest or a detention without probable cause.

Petitioner submits that Respondent has been unable to muster legal authority or persuasive reasoning to support a distinction between negligence and other types of fault-based torts for purposes of § 1983.[12] Moreover, Respondent has offered no evidence that the Congress which enacted the 1871 statute intended to require more than an allegation of fault, such as negligence, to support a claim by a state prisoner injured by his custodians. Recent scholarship indicates that Congress specifically intended to preserve common law duties that were owed by state

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[11] Apparently, Respondent argues to the Court that if a prisoner is compelled to obtain his medical treatment from a prison doctor, the state may create an immunity doctrine that could bar the prisoner from recovering for medical malpractice in state or federal court, even though this negligence may result in death or permanent serious injury. The Court has never confronted such a claim in its past cases.

[12] Although few cases arose under § 1983 before 1960, there is authority predating the recent cases which plainly holds that § 1983 does not require proof of willfulness, maliciousness or intentional acts. *See, e.g., Brickhouse* v. *Brooks*, 165 Fed. 534 (C.C.E.D.Va. 1908).

officers.[13] Thus, it appears that Congress specifically intended that prisoners be protected by § 1983 from injuries due to the fault of state officers.

Even if the Court could find some indication that Congress wished to require something more than negligence as a prerequisite to an action under § 1983, that *something more* exists in suits brought by prisoners. The fact is that sheriffs and other officials who have custody over prisoners owe a special duty to care for those in their custody. Thus, in the instant case, Petitioner has alleged both negligence *and in addition* the breach of this special duty. In fact, this kind of breach is the original example of aggravated or unusual negligence.[14] This Court recognized a similar duty of care owed to passengers by common carriers in *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 455-56 (1880) (and cases cited therein). Accordingly, the instant case is properly brought under § 1983 even if something more than negligence must be shown.

## III. RESPONDENT OFFERS NO AUTHORITIES SUGGESTING THAT OFFICERS WHO HAVE TOTAL CONTROL OVER A PRISONER OWE THAT PRISONER NO DUTY OF CARE.

Petitioner cited in his opening brief this Court's decision in *South* v. *Maryland*, 59 U.S. 396 (1856), which plainly recognized that a sheriff is liable for acts of misfeasance or non-feasance causing injury to a party in the sheriff's custody. The special duty of care was recognized in England as well as in the United States. Petitioner argues that when Congress legalized one form of involun-

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[13] *See* Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601 (1985).

[14] *See* Prosser & Keeton, *supra* note 2, § 34, at 208-09.

tary servitude, imprisonment pursuant to a conviction, in the Thirteenth Amendment it surely would not have wanted to relax the duty of care owed by sheriffs and other custodial officers. The laxness of these officers was partly responsible for the unequal treatment of persons prior to the Civil War. It is inconceivable that Congress would have become indifferent to the negligence of sheriffs and other custodial officials after the War.

This Court stated in *Ingraham* v. *Wright*, 430 U.S. at 672-73, that "[t]he Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection they had enjoyed as Englishmen against the power of the Crown." *South* v. *Maryland* recognized that one such protection was the right to recover against a sheriff for breach of his ministerial duties, a right that had been established for centuries. 59 U.S. at 402-03. That right became part of the Due Process Clause of the Fourteenth Amendment.[15]

Respondent offers no answer to this argument, except to say that the Court should ignore the history and treat prisoners as if they were no differently situated from free citizens. (Brief for Respondent, at 15-16.) But, prisoners are differently situated.

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[15] After deciding the instant case, the court of appeals decided *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985), and recognized that a right to affirmative protection arises from a custodial relationship. It cited *Fox* v. *Curtis*, 712 F.2d 84 (4th Cir. 1983). After deciding *Davidson* v. *Cannon*, No. 84-6470, which is being argued together with the instant case, the Third Circuit also recognized that a custodial relationship imposes a special duty of care upon officers. *Estate of Bailey* v. *County of York*, 768 F.2d 503 (3d Cir. 1985).

> [T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly governmental, all wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others.

*Morales* v. *Schmidt*, 340 F.Supp. 544, 550 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973), *remanded on reh'g en banc*, 494 F.2d 85 (1974).

## IV. RESPONDENT MAKES NO ARGUMENT THAT IT IS REASONABLY LIKELY THAT PETITIONER COULD AVOID A SOVEREIGN IMMUNITY DEFENSE IN STATE COURT, BUT ARGUES THAT PETITIONER NEVERTHELESS HAD A MEANINGFUL STATE COURT REMEDY.

Respondent asks this Court to hold that under *Parratt* and *Hudson* a state court remedy is adequate if two criteria are satisfied: 1) "state law provides the injured party with the opportunity for a hearing before a court or other tribunal with the power to grant a remedy," and 2) defenses or limitations upon suits are not "arbitrary and irrational." (Brief for Respondent, at 3-4, 29-30.)

Were Respondent's argument to be accepted, any state could assure that no one ever could hold any of its officers liable under § 1983 for torts upon prisoners. Respondent's argument would permit a state to protect all of its officers against suits for any form of tortious behavior—i.e., negligence, recklessness, intentional torts, even murder—simply by expanding the doctrine of sovereign immunity. Respondent supports the Virginia Supreme Court's broadening of sovereign immunity in recent years to cover

almost all state officers. (Brief for Respondent, at 26.) Respondent states that it is rational for a state to broaden immunity in order to protect officers from the burdens of suits and to encourage people to take public jobs. *Id.* But, if these rationales mean that officers can effectively be immunized from liability, no prisoner would have a right to protection at all. As noted above, § 1983 was intended to carry forward the protection that prisoners were entitled to receive from their jailers.

Respondent would have this Court hold that there is a meaningful remedy if a state permits a prisoner to file a suit but establishes a rule of law that bars the prisoner from holding officers liable for the tortious harm that they have inflicted upon the prisoner. In other words, Respondent asks this Court to hold that the *Parratt* concept of a meaningful remedy does not require that an injured party have any real chance for relief in a state court; it is enough that a suit can be filed which by law must be dismissed.

It is this overbroad notion of sovereign immunity that Petitioner claims negates the very concept of a meaningful remedy. Petitioner's argument is straightforward: an officer like Respondent must be accountable for the injuries suffered by a prisoner as a result of the officer's negligence while the prisoner is entrusted to his care.[16]

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[16] Petitioner has never argued that the scope of the state remedy must be identical to the scope of a federal remedy. He has claimed only that a state owes a duty to those whom it imprisons to protect them and to provide a meaningful, adequate remedy for breaches of that duty. The precise contours of the remedy may well differ among the states. The problem with sovereign immunity of the sort established by the Commonwealth of Virginia and relied upon by Respondent is not that it is different from federal immunity, but that it entirely negates the duty and the remedy to which a prisoner is entitled.

The original panel opinion of the court of appeals reasoned that sovereign immunity was like a statute of limitations defense—i.e., the existence of a defense does not negate the remedy. (J.A. at 30.) But the en banc court recognized the error of this reasoning and did not follow it. The reasoning fails because a statute of limitations gives a plaintiff a fair chance to vindicate his claim; all that he must do is avoid tardiness. Sovereign immunity negates the claim and abolishes liability.

Once this is understood, it is perfectly clear that Respondent's lame effort to argue that if an overbroad sovereign immunity doctrine means that a state's protection of prisoners is not meaningful, a state's rule on contributory negligence or comparative negligence might also cause problems. This plainly is not a serious argument, since there is no comparison between contributory negligence and sovereign immunity. Contributory negligence denies a plaintiff recovery because of his own wrongdoing, not because the law makes an official immune. A prisoner has no right to be negligent, and Petitioner has never claimed any such right. His claim is, and has been, that a state may not deny a prisoner a remedy against a negligent officer who has tortiously injured the prisoner when the prisoner was faultless. After months and months to prepare a brief, Respondent has been unable to suggest a single other defense which would be suspect under the "meaningful remedy" analysis should Petitioner prevail.[17]

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[17] At one point, Respondent posits that a state statute of limitations might be different from the statute governing § 1983 cases. This suggestion is untenable, however, in light of this Court's decision in *Wilson* v. *Garcia*, ____ U.S. ____, 105 S.Ct. 1938 (1985). *See* note 1 *supra*.

It now appears that Respondent is arguing that sovereign immunity indeed would bar Petitioner's suit, but that the doctrine is not wholly arbitrary or irrational.[18] That doctrine, however, denies Petitioner a remedy for negligence no matter how strong his proof and how great his injury. For this reason, the Virginia sovereign immunity doctrine denies Petitioner and similarly situated prisoners a meaningful remedy.

## CONCLUSION

Petitioner does not ask this Court to open the doors of federal courts to negligence claims without reservation. Rather, Petitioner asks that this Court hold the Commonwealth of Virginia and its officers accountable in the same way that sovereigns and their officers have been accountable for hundreds of years for taking due care to protect the lives and safety of prisoners under their exclusive control. If the state courts of Virginia were open to suits for negligence and the doctrine of sovereign immunity were

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[18] When this case was argued with the two companion cases, the court of appeals questioned counsel in each case about common issues in all cases. The court ordered that the rehearing proceed on the original briefs. The Virginia Attorney General, who appeared on the brief in the companion cases, technically was not on the brief in the instant case. The arguments made in the brief for the defendants in the companion cases, as well as the oral argument by an Assistant Attorney General, were virtually identical to and supported the arguments made in the instant case. The court of appeals listed the Attorney General and his assistant as counsel when it issued its opinion in the instant case. This caused Petitioner to state at pages 3 and 29 that the Attorney General had joined Respondent's brief. A more precise statement is that the Attorney General's arguments in the consolidated cases below were the same as and supportive of Respondent's.

properly narrowed, Petitioner and others like him would litigate their cases in state court.

It is Respondent, not Petitioner, who asks this Court for too much. He wants to claim sovereign immunity as an absolute bar to a state court recovery and have the federal courts decline to hear Petitioner's complaint. Respondent casts his argument in the language of federalism, but its true nature is unmistakable. The fact is that Respondent wants to avoid liability for his negligence. Were this not so, he would have waived sovereign immunity, and this suit would have proceeded in state court. To close the doors of the federal courts when a state makes its officers unreachable for their torts is to turn back the clock, to drain § 1983 of its protection for those most vulnerable, and to leave person, life and property unprotected for those unable to protect themselves. Section 1983 would no longer be a Civil Rights Act; it would be a statute protecting civil wrongs.

Respectfully submitted,

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